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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 609—September Term, 1974.

(Argued January 6, 1975 Decided January 30, 1975.)

Docket No. 74-2595

UNITED STATES OF AMERICA,

Petitioner,

—against—

JACK B. WEINSTEIN,
United States District Judge,

Respondent.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG and MANSFIELD, *Circuit Judges.*

Petition for a writ of mandamus directing Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York to vacate orders entered by him directing the Government to produce the Selective Service files of 23 fugitive defendants indicted for Selective Service Act violations so that they might be inspected by an attorney appointed by respondent without defendants' authorization or consent and by amicus curiae for the purpose of discovering evidence that might support proposed motions to dismiss the indictments. Petitioner also seeks an order precluding respondent

from entertaining motions by unauthorized counsel on behalf of the fugitive defendants.

Petition granted.

EDWARD R. KORMAN, Chief Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, Brooklyn, N.Y., of counsel), *for Petitioner.*

LOUIS LUSKY, Esq., New York, N.Y., *for Respondent.*

MICHAEL E. TIGAR, Esq., Washington, D.C. (Williams, Connolly & Califano, Washington, D.C., of counsel), *Amicus Curiae* urging denial.

MANSFIELD, *Circuit Judge:*

Pursuant to 28 U.S.C. §1651 the Government seeks a writ of mandamus directing United States District Judge Jack B. Weinstein ("respondent") to vacate orders entered by him in November 1974, requiring the Government to produce the Selective Service files of 23 delinquent registrants who have failed to appear in criminal proceedings pending against them.[1] Judge Weinstein ordered

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1 *United States* v. *David Arthur Lidov*—68 Cr. 67;
United States v. *Michael Rosenbaum*—68 Cr. 204;
United States v. *Barry Lawrence Friedman*—69 Cr. 54;
United States v. *Alan Stephen Dorn*—69 Cr. 57;
United States v. *Arthur Marc Campus*—69 Cr. 182;
United States v. *Maurice A. Henry*—71 Cr. 1338;
United States v. *James Ralph Blumer*—72 Cr. 478;
United States v. *Thomas Martin Austin*—72 Cr. 494;
United States v. *Ronald Edward Territo*—72 Cr. 622;
United States v. *Paul Parker*—72 Cr. 739;

that the files be made available for discovery and inspection by an attorney appointed by him to represent the fugitive defendants without their authority and by another attorney appearing as *amicus curiae*.

Since the purpose of the court-initiated discovery was to determine whether motions might be made by the court-appointed representative for dismissal of the indictments, the Government also seeks an order barring respondent from entertaining such motions. We agree with the Government that the respondent lacks the power to order the Government to make the discovery directed by him and that, absent consent by the defendants, the court-appointed counsel lacks authority to represent them. Accordingly, the petition is granted.

On September 10, 1974, respondent on his own initiative entered an order declaring that the defendants in some 26 Selective Service criminal cases pending before him were allegedly fugitives without representation.[2] He took judi-

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United States v. *Sidney E. Salzmann*—72 Cr. 740;
United States v. *Charles Penn Sleeth*—72 Cr. 757;
United States v. *Alvin Marris Higgs*—72 Cr. 780;
United States v. *Robert Richard Perez*—72 Cr. 803;
United States v. *Albert Antonio Martinez*—72 Cr. 810;
United States v. *Edward James Luerssen*—72 Cr. 824;
United States v. *Michael David Frazier*—72 Cr. 834;
United States v. *Thomas John Collura*—72 Cr. 1028;
United States v. *James Thomas Bezousek*—72 Cr. 1290;
United States v. *Paul Estremera*—72 Cr. 1291;
United States v. *Lester Patrick Nolan*—73 Cr. 41;
United States v. *Michael David Powers*—73 Cr. 126;
United States v. *Kenneth Paul Albanese*—73 Cr. 132.

On January 27, 1975, the Government advised that it no longer seeks relief with respect to defendant Paul Estremera, 72 Cr. 1291, for the reason that, upon being extradited to the United States on other charges, Estremera appointed Jesse Berman, Esq., to represent him in lieu of Professor Lusky, and the Government proposed to turn over his Selective Service file to Mr. Berman for review.

2 One of the 26 cases in which respondent's orders were entered has been terminated by reason of the defendant's death (*United States* v. *Lockwood*, Cr. 43456 (1954)). The Government has moved to dismiss

cial notice that the President and Congress were considering some form of amnesty for fugitives in such cases, which might affect their rights. Without notice to the Government or to the defendants he thereupon appointed Professor Louis Lusky of the Columbia University School of Law to represent the defendants.

Upon learning of the order the Government advised the court that, if the fugitive defendants should return to the United States, it would be willing to cooperate in the handling of the charges against them in a manner consistent with the formulation of new guidelines for such cases, but that in its opinion the court's order was invalid. Following a short stay, respondent held a hearing and within a few hours filed a memorandum decision and order upholding his earlier ex parte order. His memorandum decision took the view that fugitive cases were artificially inflating the caseload of the court and the prosecutor. In order to guarantee "prompt disposition" of these cases he proposed to call them up in accordance with the practice followed by him in the handling of fugitive cases, which was to determine whether the Government was making reasonable efforts to apprehend the fugitives, whether the public or the defendants were being prejudiced by the delay, and whether the indictments should not be dismissed.

Respondent did not state the manner in which the fugitive defendants (or, for that matter, anyone else) might be prejudiced by the pendency of the Selective Service indictments other than to suggest that the President's Amnesty

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two others, one because of the inadvertent destruction of the defendant's Selective Service file (*United States* v. *Wilson*, 69 Cr. 155) and the other because the defendant's induction order had been improperly accelerated on account of his failure to complete and return a form claiming conscientious objector classification (*United States* v. *Dewey*, 66 Cr. 456). Thus the number of cases was reduced to 23 by the time the present petition was filed.

Proclamation, characterized by respondent as a "pretrial diversion or deferred prosecution scheme," might present an unfair choice to guiltless defendants since some of the indictments might turn out to be "invalid" and the President's proposal might subject innocent defendants to pressure to accept the Amnesty Plan "alternative service" rather than face trial. However, respondent did not suggest that, if a fugitive should return to the jurisdiction, he could not obtain a fair trial in which, if the Government should fail to prove its case beyond a reasonable doubt, the defendant would be acquitted.[3] Respondent therefore proposed to "screen" the Selective Service cases in question to determine whether some or all might be dismissed on the basis of defenses disclosed by the Selective Service files. Toward that end, notwithstanding the defendants' absence as fugitives from the jurisdiction and their failure to authorize any such action to be made on their behalf, respondent denied the Government's motion to set aside his September 10, 1974, order.

In proposing to proceed without the presence or authorization of the defendants to decide motions that might be made by respondent's appointee on their behalf, respondent relied upon decisions upholding the court's power, pursuant to Rule 12(b)(2), F.R.Cr.P., *sua sponte* to dismiss an indictment appearing insufficient on its face and to dispense with the defendants' presence upon hearing pretrial motions. However, no authority was cited for the proposition that a trial court might, without a defendant's presence or consent, make an evidentiary disposition of a

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3 Although Judge Weinstein did say "Efficiency rather than fairness may result in the 'relaxation of standards of evidence and a presumption of guilt.' *See* R. W. Balch, Deferred Prosecution: The Juvenilization of the Criminal Justice System, 38 FEDERAL PROBATION 46, 50 (June 1974)," we do not construe this as meaning that the Government would be relieved of its usual burden of proof.

criminal case upon motion of an attorney acting without the defendant's knowledge or consent.

Having appointed Professor Lusky to represent the fugitive defendants, respondent proposed to entertain motions on their behalf to dismiss the indictments on the ground that the defendants had been denied a prompt trial in violation of the defendants' Sixth Amendment rights, even though prompt trials had been rendered impossible by the defendants having fled the jurisdiction and their never having sought a trial. When the Government submitted affidavits attesting to the fugitive status of 23 of the defendants and the Government's good faith efforts to locate and arrest them, respondent denied the motions of his appointed representative, Professor Lusky, to dismiss the indictments for lack of a speedy trial. However, while apparently unable to find the indictments defective on their face, respondent accepted the suggestion of an *amicus curiae*, Michael Tigar, Esq., that Professor Lusky be permitted to inspect the defendants' Selective Service files with a view to determining whether motions might lie to dismiss the indictments on the basis of defenses appearing in the files. When the Government objected on the ground that the court lacked the power to direct such discovery, respondent ordered that the files be turned over to him so that he might make copies available to Professor Lusky and Mr. Tigar. The Government, while refusing to turn over the files for inspection by Messrs. Lusky and Tigar, advised respondent that it was willing to provide a copy of each defendant's file to the defendant or his authorized representative.[4]

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4 The Government has supplied Professor Lusky and Mr. Tigar with the last known addresses of each of the defendants. Upon oral argument Professor Lusky advised that he had communicated with the defendants and expected to be retained by some of them.

On November 26, 1974, respondent granted the Government's request for a 14-day stay pending its filing of the present petition, which was lodged on December 9, 1974.

DISCUSSION

The extraordinary writ of mandamus, which is rarely granted in civil cases, is even less frequently issued in criminal proceedings, principally because of policy reasons based upon the defendant's rights under the Speedy Trial and Double Jeopardy provisions of the Constitution. *Will* v. *United States*, 389 U.S. 90, 96 (1967). Use of the writ as a substitute for appeal or as a means of circumventing the Criminal Appeals Act is barred. *Id.* pp. 96-97; *United States* v. *Weinstein*, 452 F.2d 704 (2d Cir. 1971), *cert. denied sub nom. Grunberger* v. *United States*, 406 U.S. 917 (1972). However, in the unusual case where a district judge has clearly exceeded his powers the petition for a writ of mandamus may be granted, see, e.g., *United States* v. *Smith*, 331 U.S. 469 (1947); *Ex parte United States*, 287 U.S. 241 (1932); *Ex parte United States*, 242 U.S. 27 (1916); *United States* v. *Mayer*, 235 U.S. 55 (1914); *United States* v. *Dooling*, 406 F.2d 192, 198-99 (2d Cir.), *cert. denied sub nom. Persico* v. *United States*, 395 U.S. 911 (1969); *United States* v. *Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974); *United States* v. *Weinstein*, *supra*, even with respect to an interlocutory procedural order, *United States* v. *Carter*, 493 F.2d 704 (2d Cir. 1974); *Hilbert* v. *Dooling*, 476 F.2d 355 (2d Cir.) (*en banc*), *cert. denied*, 414 U.S. 878 (1973).

We believe this to be one of those rare, *sui generis* cases in which unique circumstances require that the writ be granted. For reasons noted below, we are satisfied that the district judge has clearly exceeded his powers. Issuance of the writ will not affect any defendant's constitu-

tional right to a speedy trial, since each is a long-time fugitive who has not sought trial but, on the contrary, by fleeing the jurisdiction, has prevented his case from being brought promptly to trial. Should the indictments be dismissed for failure to comply with the discovery order, the Government is not assured of the right to appeal under 18 U.S.C. §3731. Indeed such an appeal would probably not lie with respect to those cases in which the indictment was filed prior to January 2, 1971, when §3731 in its present form was enacted, see *United States* v. *Apex Distrib. Co.*, 270 F.2d 747 (9th Cir. 1959) (*en banc*), and there is the risk that the Government might be precluded on double jeopardy grounds from appealing dismissals based on facts not appearing on the face of the indictments, see *United States* v. *Jenkins*, 490 F.2d 868 (2d Cir. 1973), *cert. granted*, 417 U.S. 908 (1974); *United States* v. *Velazquez*, 490 F.2d 29 (2d Cir. 1973) (dissenting opinion of Chief Judge Kaufman); Note, Government Appeals of "Dismissals" in Criminal Cases, 87 Harv. L. Rev. 1822 (June 1974).

Turning to the merits, we are satisfied that respondent lacks statutory or inherent power to enter the order challenged by the Government. None of the rules relied upon by respondent supports his action. Rule 16(b), F.R.Cr.P., is unavailing since it authorizes discovery of documentary evidence only upon the defendant's motion and no fugitive defendant in the present case has authorized Professor Lusky to act as his counsel, much less to file such a motion on his behalf. Similarly Rule 17 permits the issuance of a subpoena only upon the request of a "party," which has not been made here. Rule 12(b)(2), which authorizes the court to notice "lack of jurisdiction or the failure of the indictment or information to charge an offense," is limited in scope. See, e.g., *Hughes* v. *Thompson*, —— U.S. ——, 94 S. Ct. 829 (1974). It does not authorize action of the

type undertaken by respondent, such as a court-initiated discovery designed to uncover evidence of non-jurisdictional defenses not appearing on the face of the indictment, which might then become the subject of unauthorized motions to dismiss, even though such defenses may be waived if not raised by the defendants, see, e.g., *United States* v. *Sisson*, 339 U.S. 267, 301 (1969); *United States* v. *Sandbank*, 403 F.2d 38, 40 (2d Cir. 1968), *cert. denied*, 394 U.S. 961 (1969).

Assuming that the Selective Service files were introduced as exhibits before the Grand Jury which filed indictments against the fugitive defendants, Rule 6(e), F.R.Cr.P., which permits disclosure of matters occurring before the Grand Jury "only when so directed by the court," was not designed as an authorization for pretrial discovery. Its purpose, on the contrary, is to protect the secrecy of the Grand Jury proceedings by restricting disclosure to the exceptional case where a particularized need is shown.[5] Since Selective Service files are confidential in nature, see *United States* v. *Weintraub*, 429 F.2d 658, 661 (2d Cir. 1970), *cert. denied*, 400 U.S. 1014 (1971); *United States* v. *Strayhorn*, 471 F.2d 661, 665 n.4 (2d Cir. 1972); 32 C.F.R. §1608.2,[6] they should not be disclosed to persons other than the government officials concerned or to the defendant or his authorized representative. Neither Prof. Lusky nor Mr. Tigar has been authorized by the defendants to inspect their respective files. In any event the in-

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5 In any event it is questionable whether Rule 6(e) applies to documents marked as exhibits before the Grand Jury. Cf. *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960).

6 Section 1608.2 provides in pertinent part that the "records in a registrant's file and the information contained in such records shall be confidential." The regulation appears to have the force and effect of law, see *Paul* v. *United States*, 371 U.S. 245, 255 (1963); *United States* v. *Short*, 240 F.2d 292, 298 (9th Cir. 1956).

dictments are "not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974).

Nor can support for respondent's action be found in Rule 48(b), which permits the court on its own motion to dismiss an indictment, information or complaint "if there is unnecessary delay in bringing a defendant to trial." Aside from the fact that the delay here is attributable to the defendants' flight, the Selective Service files would not be probative on the issue of a delay that must necessarily have occurred after the action taken by the local Selective Service boards.

Lastly respondent's action cannot be analogized to the appointment of counsel to represent absent or legally incompetent persons in civil proceedings. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In such proceedings the judgment of the court is binding on the absent or incompetent party, provided due process requirements are satisfied, whereas in a criminal proceeding any action taken by the court at the behest of a representative appointed without the defendant's knowledge or consent could not bind the fugitive defendant. While a defendant may waive his own presence at a hearing of pretrial motions in a criminal case, see Rule 43, F.R.Cr.P., the attorney moving on his behalf must at least have been authorized by the defendant to act as his counsel in the case. None of the decisions cited by respondent supports the proposition that the court may act upon a motion by an unauthorized attorney appointed by the court itself.

The absence of any statutory or inherent authority for district court action of the type taken by respondent is not surprising. The challenged orders violate a fundamental premise underlying our method of administering justice. Ours is essentially an adversarial, not an inquis-

itorial, system. Whatever may be the judge's role in countries governed by a system of Civil Law, where the judge may by custom engage in investigative or prosecutorial activities, we have chosen to administer justice through courts which are limited to the adjudication of cases and controversies in an adversarial setting. See Art. III, U. S. Constitution; *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). With rare exceptions a federal court is not authorized to act *sua sponte;* an adversarial interest is essential. *Jenkins* v. *McKeithen*, 395 U.S. 411, 423 (1969). Although district judges possess the power to issue writs "in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. §1651, no usage or custom exists that permits a judge to appoint himself or a stranger as the representative of a defendant who has fled the jurisdiction in order to avoid facing criminal charges, at least without the fugitive's authority or consent. Indeed, controlling precedent is to the contrary. The flight of a defendant for the purpose of avoiding prosecution or punishment "disentitles [him] to call upon the resources of the Court for determination of his claims," *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970);[7] see *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *United States* v. *Sperling*, —— F.2d —— (2d Cir. Oct. 10, 1974), Slip Opin. 5637, 5673 n.33; *Dawkins* v. *Mitchell*, 437 F.2d 646 (D.C. Cir. 1970); *People* v. *Genet*, 59 N.Y. 80 (1874). Moreover, at one time the penalty for failure to appear could be an order outlawing the defendant. See Chitty, A Practical Treatise on the Criminal Law (1819 ed.), p. 284.

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7 Molinaro was presaged by Justice Frankfurter's dissenting opinion in *Eisler* v. *United States*, 338 U.S. 189, 192 (1949), to the effect that Eisler's flight from the United States deprived the Court of jurisdiction. "Since the Court is without power effectively to decide against him, it is without power to decide at all."

The administration of justice is not served by the court's unilateral effort to activate the defense of a criminal case in which prosecution has been frustrated by the defendant's flight from the jurisdiction. In the present cases, for instance, the dormant files are mere statistics which do not preclude the active prosecution of hundreds of other pending viable criminal cases against persons located within the jurisdiction. Nor should the pendency of indictments against fugitives who may be innocent inhibit them from returning to the jurisdiction or coerce them into the performance of alternate service under an amnesty plan. The remedy of a guiltless fugitive, assuming some of the defendants may be so classified,[8] is to avail himself of his Sixth Amendment right to a speedy and public trial, with all the constitutional guarantees associated with it.[9] The Government's failure to prove guilt beyond a reasonable doubt will then lead to his acquittal. In the meantime, no public interest is served by proceeding without his consent or authorization.

For the foregoing reasons the petition is granted. A writ will accordingly issue directing respondent (1) to vacate the orders entered by him on November 1, 21 and

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8 Respondent erroneously suggests that, because a large proportion of Selective Service indictments have been dismissed, the indictments which are the subject of his orders may be vulnerable to dismissal on the ground that they "will not be supported by the record." However, the vast majority of such dismissals are attributable to the Government's adherence to a policy of consenting to dismissal upon a defendant's compliance with an order to report for induction or alternative civil work. Hearings before Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 92nd Cong., 2d Sess. p. 396 (1972). The percentage of dismissals because of such compliance with induction orders in the Eastern District of New York is estimated at 85-90%.

9 Indeed, should a defendant's Selective Service file reveal undisputed facts constituting a valid defense to a charge of failure to report for induction, he might seek a dismissal or judgment of acquittal by moving under Rule 12(b)(4), F.R.Cr.P.

26, 1974, ordering that the Selective Service files of each of the above-named 23 fugitive defendants be made available for disclosure to and inspection by Professor Louis Lusky and Michael E. Tigar, Esq., without authority from the defendant whose file is sought, and (2) to cease entertaining motions on behalf of any of the 23 defendants raising non-jurisdictional defenses to the indictments against such defendants, without authority from the defendant or defendants to act on their behalf.

We should make it clear that we do not intend to preclude Judge Weinstein from entertaining motions on behalf of fugitive defendants who have agreed that Professor Lusky or any other attorney represent them. Compare *In re Federal Public Defender*, ———— (D. Ore. 1974) (tentative appointment of lawyer under Criminal Justice Act for fugitive Selective Service defendants, subject to their agreement to be represented and their showing of eligibility under the Act).

APPENDIX B

Memorandum and Order, September 10, 1974

[Caption and appearances omitted]

In each of the above twenty-two Selective Service cases pending before me the defendants have been indicted but the prosecutions have not gone forward because the defendants are allegedly fugitives. As a result of their status no defense counsel have been representing them. In view of current events this lack of legal representation may prejudice their positions.

The court takes judicial notice of the fact that the President and Congress are considering some form of amnesty that may affect the rights of these defendants and thousands of others who are similarly situated.

Accordingly, Professor Louis Lusky, 435 West 116th Street, New York, New York 10027, Telephone Number 212-280-2632, is appointed to represent them. Professor Lusky is a distinguished member of the state bars of New York and Kentucky and of many federal bars; he served as law clerk to the late Chief Justice Harlan F. Stone; he has argued cases in all courts, including the Supreme Court of the United States. He will consult with the United States Attorney and appear before this court at 10:00 A.M. on Friday, September 20, 1974.

The United States Attorney will mail a copy of this Memorandum and Order to each defendant at his last known address. Correspondence from a defendant will be

received; in the absence of a defendant his relative or next best friend will be heard on his behalf.

So ordered.

Dated: Brooklyn, New York
September 10, 1974

/s/ Jack B. Weinstein
U.S.D.J.

APPENDIX C

Memorandum and Order, September 30, 1974

[Caption omitted]

7. Criminal Law ⇐656(3)

Motions addressed to legal sufficiency of indictments can be heard in defendant's absence U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐611.7(1)

Federal district court has power to appoint counsel to appear on behalf of fugitive defendants in selective service criminal cases and to make motions addressed to sufficiency of indictments. Fed.Rules Crim.Proc. rules 2, 50(b), 18 U.S.C.A.; Military Selective Service Act, §§ 1 et seq., 6(j), 50 U.S.C.A. App. §§ 451 et seq., 456(j).

David G. Trager, U. S. Atty., E. D. N. Y., Brooklyn, N. Y., for the United States; Edward R. Korman, Thomas Mahrer, of counsel.

Louis Lusky, New York City, for defendants.

Michael E. Tigar, Williams, Connolly & Califano, Washington, D. C., amicus curiae.

MEMORANDUM AND ORDER

WEINSTEIN, District Judge.

By its order of September 10, 1974, this court appointed Louis Lusky, Esq. to appear on behalf of fugitive defendants in twenty six selective service criminal cases and ordered the United States to give notice of this appointment to each defendant at his last known address. The order provided that the court would receive communications from the defendant, his relative, or his next best friend.

The government moves to vacate the order on the ground that this court lacks jurisdiction to take action in a fugitive case unless the defendant first surrenders. Before turning to the important substantive and procedural issues raised by the government's contention, a word needs to be said on the issue of the court's and the United States Attorney's power to control criminal calendars.

COURT CONTROL OF CRIMINAL CALENDARS

[1] Until a few years ago the practice in the Eastern District of New York was for cases to be listed on a general calendar. When a motion was to be heard or the case brought on for trial, it would be placed on the calendar of whichever judge was hearing motions or trying cases. As a result, many judges might decide different aspects of the same case and, to a considerable degree, counsel could determine which judge would hear a motion by waiting until a particular judge was in a motion part. The United States Attorney had considerable control over criminal calendars. By moving a case for trial or asking for adjournments he could indirectly select the judge. Since no one judge had responsibility for any particular case, unless the United States Attorney made a motion, fugitive cases lay dormant.

The judges of this district adopted an individual assignment system so that litigations could be disposed of more efficiently and fairly. A case is now randomly assigned to a judge immediately after indictment and he is personally responsible for its prompt disposition. Rule 2(b) Individual Assignment and Calendar Rules, Eastern District of New York, effective October 1, 1969.

The individual calendar system is part of an integrated program devised during the past few years by the federal courts to ensure "the prompt disposition of criminal cases." Federal Rules of Criminal Procedure, Rule 50(b). Pursuant to Rule 50(b) the judges of the Eastern District of New York adopted a Plan for Achieving Prompt Disposition of Criminal Cases, effective April 1, 1973, "to further the prompt disposition of criminal cases." In United States v. Furey, 500 F.2d 338, at 341 (2d Cir. 1974), the court noted that the policies supporting the Plan included

> "the deterrence afforded by prompt disposition, the potential prejudice to any defense arising from delay, as

well as the disruption and anxiety created by a criminal charge."

See also United States v. Favaloro, 493 F.2d 623 (2d Cir. 1974); United States v. Bowman, 493 F.2d 594 (2d Cir. 1974); Hilbert v. Dooling, 476 F.2d 355 (2d Cir.) (en banc), cert. denied, 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973); United States v. Pierro, 478 F. 2d 386 (2d Cir. 1973); United States v. Rollins, 475 F.2d 1108 (2d Cir. 1973).

These rules were adopted pursuant to the inherent power of the courts over their calendars. They reflect a policy change from a passive judicial acceptance of laggard work in the courts to an assumption of responsibility for "fairness . . . and the elimination of unjustifiable expense and delay" (Federal Rules of Criminal Procedure, Rule 2) in determining the merits of criminal charges.

In controlling my own calendars one procedure relied upon to guarantee prompt disposition of cases is to periodically call each fugitive case to determine if (1) the government is making reasonable efforts to apprehend the fugitive, (2) the public or defendant is being prejudiced by unnecessary delay, and (3) cases which should be dismissed are carried on the docket, artificially inflating the court's and prosecutor's apparent case load. My own docket illustrates why fugitive cases cannot be ignored. There are now sixty criminal cases assigned to me; two-thirds, or forty, are listed as fugitive cases (including twenty-six selective service cases); five have been assigned trial dates; three are awaiting assignment of trial dates, and twelve are awaiting sentence following a plea or finding of guilt.

All the fugitive cases before me are in the process of being called. Previously, such calls have led to dismissals and action by the government to apprehend defendants. The government has never objected to these calendar calls and the court deems them essential to properly control its calendar.

In the past attorneys for fugitive defendants have not been appointed because there appeared to be no reason to do so. But there is obviously good reason to appoint counsel in the selective service fugitive cases now before the court.

SELECTIVE SERVICE CASES

The twenty-six defendants involved in this motion are covered by the provisions dealing with "draft evaders" in the President's proclamation of September 16, 1974, for they "allegedly unlawfully failed" to meet their obligations under the Military Selective Service Act. That part of the proclamation dealing with these cases reads as follows:

"DRAFT EVADERS—An individual who allegedly unlawfully failed under the Military Selective Service Act or any rule or regulation promulgated thereunder, to register or register on time, to keep the local board informed of his current address, to report for or submit to pre-induction or induction examination, to report for or submit to induction itself, or to report for or submit to, or complete service under Section 6(J) of such act during the period from Aug. 4, 1964, to March 28, 1973, inclusive, and who has not been adjudged guilty in a trial for such offense, will be relieved of prosecution and punishment for such offense if he:

"Presents himself to a United States Attorney before Jan. 31, 1975,

"Executes an agreement acknowledging his allegiance to the United States and the pledging to fulfill a period of alternate service under the auspices of the director of Selective Service.

"Satisfactorily completes such service.

"The alternate service shall promote the national health, safety or interest. No draft evader will be given the privilege of completing a period of al-

ternate service by service in the armed forces.

"However this program will not apply to an individual who is precluded from rendering the United States under 8 U.S.C. 1182(A)(22) or other law. Additionally, if individuals eligible for this program have other criminal charges outstanding, their participation in the program may be conditioned upon, or postponed until after, final disposition of the other charges have been reached in accordance with law.

"The period of service shall be 24 months, which may be reduced by the Attorney General because of mitigating circumstances."

A release of the Office of the White House Press Secretary summarized the procedures to be followed by persons in the draft evader class:

UNCONVICTED DRAFT EVADER

1. Report to United States Attorney where offense was committed.

2. Acknowledge allegiance to the United States by agreeing with the United States Attorney to perform 24 months alternate service or less based on mitigating circumstances.

3. Perform alternate service under the auspices of the director of Selective Service.

4. Director of Selective Service issues certificate of satisfactory completion of alternate service.

5. Receipt by United States Attorney of certificate of satisfactory completion of alternate service.

6. Dismissal of indictment or dropping of charges."

New York Times, September 17, 1974, p. 24, col. 4.

[2] In effect, a pretrial diversion or deferred prosecution scheme is to be applied in these cases. *See e. g.*, Administrative Office of the United States Courts Annual Report of the Director at VIII-7 (1974). This technique is being considered favorably in a number of other types of cases. It is sometimes called the "Brooklyn Plan," for one form was developed in this court. Before or after indictment, but without trial or plea, the defendant is placed under supervision. If he responds favorably over a fixed period of time—usually one or two years—he is not indicted or, if he had been indicted, the indictment was dismissed.

The saving in time and money and the enhancement of the likelihood of rehabilitation make diversion programs attractive. But they present grave dangers unless they are strictly controlled. A guiltless person may be forced to undergo strict supervision and loss of liberty because he wants to avoid the expense and embarrassment of contesting the government's case. Efficiency rather than fairness may result in the "relaxation of standards of evidence and a presumption of guilt." *See*, R. W. Balch, Deferred Prosecution: The Juvenilization of the Criminal Justice System, 38 Federal Probation 46, 50 (June 1974). Some judicial procedural check is necessary.

"Without judicial and defense counsel intervention in the diversion decision to safeguard against potential abuses of discretion, there is the danger that the results of pretrial diversion—like those of the juvenile court which itself began as a diversion mechanism—may be found not to justify the risks taken with basic constitutional guarantees."

Note, Pretrial Diversion from the Criminal Process, 83 Yale L.J. 827, 853 (1974).

Some method must be utilized to prevent abuse of plans which divert cases from the normal criminal machinery to ensure that individual rights are being safeguarded. The agency with primary responsibility to prevent prosecutorial abuse after indictment is the court.

[3, 4] While an indictment against a defendant remains outstanding, the pressure on him to agree to perform "alter-

nate service" is great even though the indictment may be invalid and there is no warrant in law for his being denominated a draft evader. We take judicial notice of the fact -based upon experience with many young men in this court accused of selective service violations -- that a number of them are inexperienced and not capable of determining their rights without counsel. Some have taken emotional positions, fleeing when their problems could easily have been resolved to their own and the government's satisfaction had they had competent legal advice. It is significant that private counsel generally were not permitted to accompany men appearing before local selective service boards. *See*, Levine v. Selective Service Loc. Bd. No. 18, 458 F.2d 1281 1287, n. 22 (2d Cir. 1972). This fact alone resulted in many errors; the lay boards with all their fine intentions and devotion to the public good, often made mistakes through lack of legal guidance.

The possibility that a selective service indictment will not be supported by the record is not insubstantial. As the table set out below indicates, a large portion of the selective service cases considered by the courts are dismissed.

DISPOSITION OF DEFENDANTS CHARGED WITH SELECTIVE SERVICE VIOLATIONS

Year	Total	Dismissed Number	%	Acquitted Number	%	Total Convicted Number	%	Probation, Fine & Other Number	%	Average Imprisonment (Months)
1965	341	88	25.8	11	3.2	242	71.0	53	15.5	21.0
1966	518	132	25.4	13	2.5	373	71.9	72	13.6	26.4
1967	996	224	22.5	24	2.4	748	75.1	82	9.2	32.1
1968	1,193	253	21.6	55	4.6	784	65.8	224	17.1	27.3
1969	1,744	747	42.8	97	5.6	900	51.6	356	20.4	36.3
1970	2,832	1,570	55.4	236	8.3	1,027	36.3	377	28.4	33.3
1971	2,973	1,701	57.2	236	7.9	1,036	34.9	659	22.2	29.1
1972	4,906	2,933	59.8	337	6.9	1,442	29.4	1,194	24.3	22.0
1973	5,495	3,338	60.8	180	3.3	977	26.6	719	19.5	17.5

Source: 1974 Semi Annual Report of the Director, Administrative Office of the United States, 62 (May 1974)

It is significant that in 1973 in the country as a whole more than two-thirds of the selective service indictments terminated were dismissed. Only seven percent of defendants whose cases were disposed of by the courts were imprisoned; the average term was 17.5 months before time off for good behavior. Many of those convicted were sentenced under the Youth Correction Act so that, upon completion of their supervision, they were granted a certificate setting aside their conviction. 18 U.S.C. § 5021. It is apparent that the overwhelming majority of those indicted whose cases were disposed of by the courts in 1973 received more "lenient" treatment than would be accorded under the President's proclamation. There is no reason to suspect that the clear trend against severity in these cases will be reversed in 1974.

Both from the point of view of effective calendar control and protection of the rights of those accused of draft evasion, it is desirable to screen these selective service cases to determine if they have any merit. But the government contends that the court lacks power to do this unless the defendant first surrenders, the question to which we now turn.

POWER OF THE COURT TO DECIDE MOTIONS ON BEHALF OF FUGITIVES

[5] It is unusual for the government to urge the court's lack of power to determine matters in the absence of a defendant. The rules against trials in absentia were designed to protect the defendant's, not the government's, rights. *See, e. g.*, the right to confrontation in the Sixth Amendment. As Mr. Justice

Cardozo pointed out in Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-106, 54 S.Ct. 330, 332, 78 L.Ed. 674, 678 (1934):

"[t]he defendant has the privilege . . . to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (Emphasis supplied.)

The court rejected the need for the defendant's presence "when presence would be useless, or the benefit but a shadow." *Id.* at 106-107, 54 S.Ct. at 332, 78 L.Ed. at 678.

Certainly the defendant cannot be present at preliminary phases of the criminal proceeding such as indictment. Normally he is not required to be present on calendar calls or the argument of preliminary motions. Under Rule 12 of the Federal Rules of Criminal Procedure, motions raising defenses and objections must be made before a plea is entered unless the court permits otherwise, suggesting that the defendant need not be present. *See*, United States ex rel. Coleman v. Cox, 47 F.2d 988 (5th Cir. 1931), holding that the defendant need not be produced in order to permit the court to pass on a demurrer to the indictment. Rule 43 of the Federal Rules of Criminal Procedure is explicit in requiring his presence at arraignment, trial and sentence, suggesting again that the defendant's presence is unnecessary at pretrial motions when there is no evidence being taken and, therefore, no need to confront witnesses.

In United States v. Lynch, 132 F.2d 111 (3d Cir. 1942), cert. denied, 318 U.S. 777, 63 S.Ct. 831, 87 L.Ed. 1146 (1943) the court ruled that no constitutional right had been violated by the lack of the defendant's presence during a hearing to vacate judgment and sentence:

"We do not understand that the right of a defendant to be present in court throughout his trial has ever been considered to embrace a right to be present also at the argument of motions prior to trial or subsequent to verdict." 132 F.2d at 113.

See also, United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied sub nom. Roberts v. United States, 401 U.S. 925, 91 S.Ct. 881, 27 L.Ed.2d 828 (1971); United States v. Malinowski, 347 F.Supp. 347 (E.D.Pa.1972), aff'd. 472 F.2d 850 (3d Cir.) cert. denied, — U.S. —, 93 S.Ct. 2164, 36 L.Ed. 2d 693 (1973). This circuit has even held that the presence of a defendant during a pretrial suppression hearing was not mandated by the Sixth Amendment. The defendant's absence "did not jeopardize his ability to confront witnesses testifying as to his guilt and the incidents surrounding his frisk, or hinder the effectiveness of his counsel's assistance." United States v. Bell, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972). Even in habeas corpus matters, the prisoner need not be present for the argument of the motion to determine whether he needs to be produced for a hearing. 28 U.S.C. § 2243; United States v. Hayman, 342 U.S. 205, 222, 72 S.Ct. 263, 274, 96 L.Ed. 232, 243 (1952).

The position that the court may act prior to the defendant's surrender was recently recognized by Mr. Justice William O. Douglas, sitting as Circuit Justice on a stay application in Hughes et al. v. Thompson, Judge, 415 U.S. 1301, 94 S.Ct. 829, 830, 39 L.Ed.2d 93 (1974). He declared:

"Under the Rules of Criminal Procedure the question of the sufficiency of the indictment 'shall be noticed by the court at any time.' Rule 12(b)(2). *Whether the motion should be disposed of prior to the arraignment rests in the sound discretion of the District Court.* The District Court certainly has the power to follow that course and sometimes it may be important to prevent harassment or the use of other unconstitutional procedures against the accused." (Emphasis supplied.)

Exercising the power which Justice Douglas had declared it to possess, the

district court considered the validity of the indictment, found it to be insufficient on its face, and dismissed it, although the court had not acquired jurisdiction of the person of the defendant (who may have remained outside the United States while these proceedings were taking place). *See* United States v. Hughes, No. LV 2843 BRT (D.Nev. 1974). Reporter's transcript at 97-103. *Cf.* Petition for Writ of Mandamus, Jason v. Coffrin, 74 2010 (2d Cir. 1974); Petition for Rehearing and Suggestion of Appropriateness of a Rehearing En Banc in United States v. Davies, 74-1161 (3d Cir. 1974); United States v. Barnette, 27, 807 (W.D.Ky., January 28, 1974) (order of dismissal).

To support its position that this court lacks power to consider these fugitive matters, the United States relies primarily upon two cases: Molinaro v. New Jersey, 396 U.S. 365, 366, 90 S.Ct. 498, 498-499, 24 L.Ed.2d 586, 588 (1970) and Lewis v. United States, 146 U.S. 370, 373, 13 S.Ct. 136, 137, 36 L.Ed. 1011, 1012-1013 (1892). Neither warrants abnegation of this court's jurisdiction to control its calendar.

[6] *Molinaro* represents the well known proposition that an appellate court may, *in its discretion*, refuse to hear a case in which a defendant has fled the jurisdiction. *See, e. g.*, Eisler v. United States, 338 U.S. 189, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949); Johnson v. Laird, 432 F.2d 77 (9th Cir. 1970); Hitchcock v. Laird, 456 F.2d 1061 (4th Cir. 1972); *cf.* Dawkins v. Mitchell, 141 U.S.App.D.C. 213, 437 F.2d 646 (1970). As Mr. Justice Murphy stated in his dissent in *Eisler*, courts should not always express their displeasure with fugitive parties by refusing to adjudicate a claim that there is no basis for the charges brought against them:

> Law is at its loftiest when it examines claimed injustice even at the instance of one to whom the public is bitterly hostile. . . . Our country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties. 338 U.S. at 194-195, 69 S.Ct. at 1456, 93 L.Ed. at 1901.

[7] The dictum in *Lewis* "that, after indictment found, nothing shall be done in the absence of the prisoner," 146 U.S. at 372, 13 S.Ct. at 137, 36 L.Ed. at 1012, is not controlling. As already pointed out, it has no necessary application to motions addressed to the legal sufficiency of indictments, which can be heard in the defendant's absence.

No constitutional inhibition against court action to determine the validity of a criminal charge absent a defendant was inserted into our Constitution by its draftsmen; there was no reason to consider the issue. Contemporary common law in England condemned fugitives through the process of outlawry. Blackstone's Commentaries On The Law, Ch. XXIV, 498 498 (Gavit ed. 1941); 1 J. Chitty, Criminal Law 347 et seq. (1816). This procedure was undoubtedly well known to colonial lawyers who relied heavily on Blackstone. A determination of outlawry was made *ex parte* but was subject to highly technical rules and reversals on writ of error. At least in non-capital (non-treason and non-felony cases), writs of error as to outlawry proceedings could be obtained by an attorney without the defendant being present, if the outlawry was before conviction. 1 J. Chitty, Criminal Law 369 (1819). This rule did not apply to treason and felony cases, apparently because there was no right to counsel in such cases at that time. It appears as if a relative was permitted to object and suggest error in the process even in a felony case in the absence of a deceased defendant. *See* 4 J. Chitty, Criminal Law 238 (1816). *But cf.*, People v. Genet, 59 N. Y. 80 (Sup.Ct.1874).

The court's right to hear from counsel on behalf of a defendant on legal issues, even during the period when a defendant had no right to counsel, was established long before adoption of our own Constitution. *See, e. g.*, 1 J. Chitty, Criminal Law 408 (1816); R. v. Lilborne, 4 Howell's State Trials 1270

(1613) (counsel on legal points); R. v. Ratcliff, 18 Howell's State Trials 430 (1746). As Chitty points out (ibid):

"it is certain, that any one may, as amicus curiæ, inform the court of any error in the proceedings [of outlawry], of which they are bound to take cognizance."

CONCLUSION

[8] The court has an interest in clearing its docket of invalid indictments and has the power to appoint counsel authorized to make motions addressed to their conscience. That was the evident purpose of the September 10th order. We need not and do not hold that the appointment carried with it the authority to speak or act for the defendants on matters relating to their guilt or innocence of the offense charged.

The government's motion to set aside this court's order of September 10, 1974 is denied.

So ordered

Lori PAIGN et al., Plaintiffs,
v.
J. Wallace LA PRADE et al.,
Defendants.
Civil A. No. 1091-72.

United States District Court,
D. New Jersey.
Aug. 29, 1974.

In an action for alleged violation of constitutional rights and of alleged rights under a postal statute, the District Court, Coolahan, J., held that where plaintiff failed to show injury to her reputation or other form of injury because of a mail cover requested by the Federal Bureau of Investigation on a political party or from a personal investigation instituted because of her corresponding with such political party, she was not entitled to recover for alleged deprivation of civil rights.

Defendant's motion for summary judgment granted in part; plaintiffs' motion for injunctive relief granted in part.

1. Post Office ⇐53

Statute providing for fine or imprisonment for the taking of any letter, etc., from post office, etc., before it has been delivered, with design to obstruct, etc., is criminal statute, and does not give rise to any civil right of action. 18 U.S.C.A. § 1702.

2. Federal Civil Procedure ⇐181

Where particular plaintiff's interest in political party was momentary and academic, and investigation of her was quickly terminated, and it was not shown that other persons investigated pursuant to same mail cover had such mild contact with the party or were cleared of suspicion as completely as the particular plaintiff, her claims were not shown to be representative for purposes of class action. Fed.Rules Civ.Proc. rule 23(a, e), (1, 3), 28 U.S.C.A.

3. Civil Rights ⇐13.1

Where plaintiff failed to show injury to her reputation or other form of injury because of mail cover requested by Federal Bureau of Investigation on political party or from personal investigation instituted because of her corresponding with such political party, she was not entitled to recover for alleged deprivation of civil rights. 18 U.S.C.A. § 1702; U.S.C.A.Const. Amends. 1, 4-6.

4. Civil Rights ⇐13.16

Where plaintiff failed to show "direct injury" from alleged deprivation of civil rights, there was no judicial power to award damages or injunctive relief, except that where there was no legal justification for continued possession by Federal Bureau of Investigation of personal file concerning plaintiff, court would order its removal from governmental cus-

body and its destruction. U.S.C.A.Const. Amends. 1, 4-6.

Frank Askin, Newark, N. J., for plaintiffs.

Henry E. Petersen, Asst. Atty. Gen., Washington, D. C., Jonathan L. Goldstein, U. S. Atty., Newark, N. J., David H. White, Dept. of Justice, Washington, D. C., for defendants.

OPINION

COOLAHAN, District Judge.

On January 11, 1973 the Director of the Federal Bureau of Investigation (FBI) requested the United States Postal Inspection Service to institute a 120-day mail cover on the national headquarters of the Socialist Workers Party (SWP) in New York City.[1] The mail cover was executed by a foreman in the New York City Post Office, who copied the information found on the envelopes of letters sent to the SWP. All information was forwarded to the New York City division of the FBI. In the course of this mail cover, the name and address of plaintiff Lori Paton were found. Plaintiff Paton's name and address were sent to defendant Special Agent in Charge La Prade of the Newark, New Jersey, FBI office. After it was ascertained that the Newark FBI files contained no information about her, Special Agent John Devlin of the Paterson, New Jersey, Resident Agent Office was assigned to investigate plaintiff Paton.

Devlin confirmed, through use of a local area directory, that plaintiff Arthur H. Paton (Lori Paton's father) lived at the address found on the letter surveyed in the mail cover. Through inquiries at a local credit bureau, Devlin learned the past and present addresses of Lori Paton's parents and the past and present places of employment of her father. Devlin interviewed Chester Township Chief of Police Edward Strait, who informed Devlin that no member of the Paton family had a criminal record. West Morris-Mendham Park High School Principal Richard Matthews and Vice Principal Gerald Work were interviewed by Devlin. The agent learned that Lori Paton was a student at the High School and was enrolled in a course entitled "Left to Right" which involved the writing of letters to political organizations of various persuasions.

Devlin concluded his investigation with his visit to the High School and reported on his findings to La Prade on April 2, 1973. A memorandum dated May 7, 1973, written by Special Agent John H. Bryan at Newark to La Prade, stated:

> In view of the fact that the subject is a high school student who apparently contacted the national office of the SWP in New York for information for one of her courses and, due to the fact that she is not believed to be involved in subversive matters, it is recommended that this case be closed administratively.

The FBI has produced, and plaintiffs have filed with this Court as part of the public record in this action, the foregoing memorandum of Special Agent Bryan and the remaining FBI files in the Paton investigation. (See Government brief at 4.) The FBI has revealed further that "Plaintiff Paton's file carries the filing symbol '53M SWP', standing for 'Subversive Matter-Socialist Workers Party', which identifies the larger investigation of which the inquiry respecting her was a part."

[1] Lori Paton, suing by her father, and William Gabrielson, her teacher in the course "Left to Right," are plaintiffs of record here. Plaintiffs have brought suit on the grounds that defendants have violated plaintiffs' rights under 18 U.S.C. § 1702[2] and the following

1. At the time of the mail cover the SWP was on the Attorney General's list of subversive organizations. The list has since gone out of existence.

2. 18 U.S.C. § 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from

APPENDIX D

Memorandum and Order, November 21, 1974

[Caption and appearances omitted]

On November 1, 1974, after a full hearing, the court, for reasons stated on the record, ordered the United States to turn over to the counsel for the defendants the selective service files which were the predicate for the indictment in each of the above cases. On request of the government a stay was granted pending filing of briefs. Those briefs have been filed and considered by the court. No reason has been given by the government which would warrant a further stay or revocation of this court's order of November 1, 1974. Accordingly the stay is vacated.

Normally the practice in this district is for the United States Attorney to xerox a copy of the selective service file and to present it to the defendant in order to make it more convenient for both the United States Attorney and defense counsel to proceed with the litigation expeditiously. By letter dated November 20, 1974, the United States notified the court:

> "The reproduction of the entire Selective Service file in each of these cases will involve a substantial expense that the United States is not required to bear under Rule 16(b) which provides only that 'the court may order the attorney for the government to permit the defendant to inspect and copy or photograph ***' the materials there described."

Rather than further embarrass the United States on this matter, the court directs that the files be made available by delivering them, or a copy, to this court in chambers within five days. This court will then have its own personnel produce a

copy for counsel for the defendants and one for the amicus curiae. Counsel for the defendants and the amicus curiae will hold the copies for the defendants.

The Clerk of the Court shall send a copy of this Memorandum and Order to counsel for the defendants, counsel for the government and to the amicus curiae.

So ordered.

Dated: Brooklyn, New York
November 21, 1974

/s/ Jack B. Weinstein
U.S.D.J.

APPENDIX E

Memorandum and Order, November 26, 1974

[Caption and appearances omitted]

Counsel for twenty-six defendants accused of violating the selective service law moves to dismiss the indictments on the ground that all the defendants have been denied their right to a speedy trial. Amicus suggests that there is a strong likelihood that some or all of the indictments are not well founded under the selective service law. Until each defendant's situation has been examined separately, dismissal on these grounds will not lie. As indicated below, the government has been directed to supply counsel with copies of the selective service file in each case to facilitate the necessary individual determination.

As additional grounds for dismissal of the indictments defendants claim that the Selective Service Act and regulations are unconstitutional as applied to these cases, in that they (1) provide for military conscription for service in wars not declared by Congress pursuant to Article I, Section 8, Clause 11 of the United States Constitution, and (2) provide for such conscription in the absence of either a declaration of war by Congress or a national emergency so grave and imminent as to justify peacetime conscription without such a declaration of war. While these claims have not yet been passed upon by the United States Supreme Court, similar claims have been rejected by the Second Circuit Court of Appeals in Orlando v. Laird, 443 F. 2d 1039 (1971), cert. denied, 404 U.S. 869 (1971) (Douglas and Brennan, JJ., dissenting), and in Da Costa v. Laird, 448 F. 2d 1368 (1971), cert. denied, 405 U.S. 979 (1972) (Douglas and Brennan, JJ., dissenting). Being bound by the decisions of the Second Circuit, these additional claims

must be denied by this court without an independent consideration of their merit.

I.

DELAY IN BRINGING THESE CASES TO TRIAL

One of the indictments in these cases has been pending since 1954; the others were handed up at various times between 1966 and 1973, the most recent having been filed with the clerk on February 6, 1973. During this period the government has made desultory efforts to apprehend the defendants by mailing notices to addresses once listed in selective service records and by occasional inquiries through the Federal Bureau of Investigation.

II.

SPEEDY TRIAL RULES

No claim has been made of a violation of the Eastern District of New York's Plan for Achieving Prompt Disposition of Criminal Cases. Effective April 1, 1973, it was designed "to further the prompt disposition of criminal cases." According to this Plan the government must be ready for trial within six months, excluding delay resulting from the absence of unavailability of the defendant. On the basis or information how available it cannot be said that the defendants were available for trial. Cf. United States v. Rollins, 487 F. 2d 409 (2d Cir. 1973); United States v. Flores, slip op. 74-1186 (2d Cir. Aug. 7, 1974). Counsel instead relies upon defendants' constitutional right to a speedy trial as guaranteed by the Sixth Amendment.

III.

SIXTH AMENDMENT

The right to a speedy trial has long been considered fundamental. See the dissertation of Chief Justice Warren in Klopfer v. North

Carolina, 386 U.S. 213, 224, 87 S. Ct. 988, 994, 19 L. Ed. 2d 1 (1967).

Recognizing that a time within which a trial must be had cannot be fixed for all cases with uniformity and precision, Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), mandates an analysis of the practical and theoretical aspects of the right to a speedy trial in the context of each individual case. Laid down was a balancing test requiring a weighing of the conduct of both the prosecution and the defendant on scales calibrated to reflect the interests of defendants, society and the Constitution.

Four factors must be assessed in determining whether a particular defendant has been deprived of his right: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. 407 U.S. at 530, 92 S. Ct. at 2187. The Supreme Court regarded none of these factors as decisive.

> "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." 407 U.S. at 533, 92 S. Ct. at 2193.

See also, e.g., United States v. Lasker, 481 F. 2d 229, 237 (2d Cir. 1973), cert. denied, -- U.S. -- ( ); United States v. Infanti, 474 F. 2d 522, 527 (2d Cir. 1973); United States v. Counts, 471 F. 2d 422, 426-27 (2d Cir.), cert. denied, 411 U.S. 935, 93 S. Ct. 1909, 36 L. Ed. 2d 395 (1973); United States v. Fasanaro, 471 F. 2d 717 (2d Cir. 1973); United States v. Colitto, 319 F. Supp. 1077 (E.D.N.Y. 1970).

Certainly the length of delay in prosecuting these indictments is sufficient to cause us to inquire into the other factors that go into the balance. The delay, of course, is mitigated by the reason for the delay -- in this case, the government's alleged inability to bring the defendants before the court.

Defense counsel argues that the government did not prosecute these defendants with due diligence in two respects. First, it contends that the return of the defendants was not sought through diplomatic channels. As recently as 1972, it was reported, and not denied, that the government did not request other governments to extradite or deport selective service indictees. See Gosfield, American War Resisters, 5 N.Y.U.J. Int'l L. & Pol. 503, 522 (1972). It is urged that the standard used by the Supreme Court in Smith v. Hooey, 393 U.S. 374, 393, 89 S. Ct. 575, 579, 21 L. Ed. 2d 607 (1969), where the Court decided that it was a state's duty to bring to trial a defendant incarcerated by authorities beyond its territorial jurisdiction, should be applied here. The situations, however, are not analogous. The practical relationship between state authorities and between state and federal authorities differs from that between our government and a foreign government. Id. at 380-381, 89 S. Ct. at 578-579.

Moreover, the political climate existing at the time must be considered in judging the reasonableness of the government's efforts. We take judicial notice of the fact that the governments and populace of the countries in which many draft fugitives sought asylum had expressed antipathy toward this country's participation in the Vietnam war. See, e.g., N. Y. Times, Nov. 3, 1974, § 6 (Magazine), 51, 66. American public opinion was also divided. Pressing strenuously for extradition might have seriously exacerbated feelings of hostility both at home and abroad. Given the serious doubt about whether any extradition treaty applied to what these other countries

may have considered political rather than criminal offenses, the decision not to seek extradition in all cases does not appear unreasonable. See generally 2 A Treatise on International Criminal Law 309-355 (M. C. Basiouni & V. Nanda eds. (1973) (military and political offenses generally not extradictable); Tate, Draft Evasion and the Problem of Extradition, 32 Albany L. Rev. 337, 355-57 (1968) (political offenses not extradictable). These factors, while not directly relevant to those normally associated with delays in the administration of justice -- e.g., absence of witnesses and calendar congestion -- do have a bearing on the bona fides of the government's action.

Nevertheless, the government's decision not to utilize legal process to attempt to return these fugitive defendants must be weighed against the importance of individual rights. The right to a speedy trial cannot be ignored merely because the government determines that extradition or other procedures are inconvenient or unavailable. In some situations, the Supreme Court has ruled that where individual rights are at stake, the government, unless it adheres to constitutionally mandated procedures, must suffer a dismissal of its indictment. Alderman v. United States, 394 U.S. 165, 183, 89 S. Ct. 961, 972, 22 L. Ed. 2d 176 (1969). In other cases, such as that involving the disclosure of an informant's identity, the Court has found that there is no fixed rule: "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." Roviaro v. United States, 353 U.S. 53, 62, 77 S. Ct. 623, 628-29, 1 L. Ed. 2d 639 (1957). See also United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953); United States v. Fernandez, slip op. 74-1164 at 282-83 (2d Cir. Nov. 6, 1974). Since, as we have noted, the second approach, calling for the balancing of a number of factors, is to be applied to speedy trial contentions, the government's action, or inaction, is not conclusive.

Second, defense counsel asserts that the government had a duty to seek out the defendants with all the investigative resources at its command and to summon before a grand jury parents, relatives, and friends, to testify as to the whereabouts of the accused. Courts have not, in general, recognized any privilege of a mother, father, relative or friend to refuse to testify on grounds analogous to those underlying the husband-wife privilege. Yet, the absence of any such rule of privilege should not be construed as a prosecutorial imperative to place parents and friends in such a difficult and conscience-taxing position. Cf. Branzburg v. Hayes, 408 U.S. 665, 707-708, 92 S. Ct. 2646, 2670, 33 L. Ed. 2d 626 (1972). The essence of justice includes not only an adherence to legal rules, but an element of compassion. See generally Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1050-53. The logic of the right to a speedy trial should not be pushed to an unnecessary extreme so that justice becomes an uncontrollable juggernaut, crushing the innocent bystander as well as the guilty.

Under the circumstances thus far brought to the court's attention, it does not appear that the delay in bringing these defendants to trial was caused either by the negligence or the inefficiency of the government. Nor was there, so far as the record now shows, a deliberate effort on the part of the government to delay all these trials. See Barker v. Wingo, supra, 407 U.S. at 531, 92 S. Ct. at 2182; Pollard v. United States, 352 U.S. 354, 361, 77 S. Ct. 481, 486, 1 L. Ed. 2d 393 (1957); United States v. Infanti, supra, 474 F. 2d at 527; United States v. Stein, 456 F. 2d 844 (2d Cir. 1971), cert. denied, 408 U.S. 922, 92 S. Ct. 2489, 33 L. Ed. 2d 333, reh. denied, 409 U.S. 898, 93 S. Ct. 101, 34 L. Ed. 2d 157 (1972). We take judicial notice of our own court records establishing that where defendants have appeared, the government has prosecuted selective service cases no less expeditiously than other kinds of cases.

The remaining factors to be considered in the balance are the defendant's assertion of his speedy trial right and the prejudice to the defendant. Although we do not find that defendants have waived their speedy trial claim, they have not heretofore asserted their right. This factor is not conclusive but the Supreme Court indicated in Barker that it is entitled to great weight:

> "Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely is the defendant to complain, The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 531-532, 92 S. Ct. at 2192.

See also United States v. Mancino, 486 F. 2d 750, 753 (7th Cir. 1973). Cf. United States v. Holt, 448 F. 2d 1108, 1111 (D.C. Cir.), cert. denied, 404 U.S. 942, 92 S. Ct. 292, 30 L. Ed. 2d 256 (1971).

We must also consider the fact that these defendants may not have been aware of their rights. We take judicial notice of the fact that many young men indicted under the Selective Service Act were without counsel. It is, therefore, likely that they did not know that they were entitled to a speedy trial or that the failure to promptly demand one might have serious adverse consequences See United States v. Butler, 426 F. 2d 1275,

1278 (1st Cir. 1970), cert. denied, 401 U.S. 978, 91 S. Ct. 1207, 28 L. Ed. 2d 328 (1971); Coleman v. United States, 442 F. 2d 150, 155 (D.C. Cir. 1971).

Prejudice to the accused is not insubstantial. The anxiety and concern caused by these indictments to the defendants, their families and friends, is significant. See United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468 (1971); Note, The Right to a Speedy Trial, 57 Colum. L. Rev. 846, 864 (1957). In addition, the ability of these defendants adequately to prepare their cases may have been affected.

In each case the factors to be weighed may balance differently. In light of all the relevant considerations thus far brought to the court's attention, it cannot be said that a blanket motion to dismiss all these cases on the ground of denial of a speedy trial can be granted. Facts to be developed in the individual cases will be considered with those already brought to the court's attention by defense counsel should motions be renewed in the individual cases.

IV.

VALIDITY OF INDIVIDUAL INDICTMENTS

The court has an independent obligation to review the current status of all indictments on its calendar, and to dismiss those which are clearly invalid. United States v. Lockwood, -- F. Supp. --, -- (E.D.N.Y. 1974); United States v. Kibbe, -- F. Supp. -- (D. Conn. 1974); United States v. McKinney, -- F. Supp. -- (E.D. Calif. 1974). See also District of Columbia v. Horning, 47 U.S. App. D.C. 413 (1918). This obligation is essentially one of speedily and justly determining every case before the court, and is independent of, and to some extent may be contrary to, the defendant's wishes in the

matter. Barker v. Wingo, 407 U.S. 514, 521, 92 S. Ct. 2182, 2187, 33 L. Ed. 2d 101 (1972); Dickey v. Florida, 398 U.S. 30, 37-38, 90 S. Ct. 1564, 1569, 26 L. Ed. 2d 26 (1970).

In Hodges v. United States, 408 F. 2d 543 551 (8th Cir. 1969), the court observed that the right to a speedy trial is constitutionally guaranteed and as such it [sic. is] not to be honored only for the vigilant and the knowledgeable: "[T]he trial court, which is the neutral arbiter for the defense as well as for the prosecution, must do all it can to keep its criminal dockets current." See also United States v. Mann, 291 F. Supp. 268 (S.D.N.Y. 1968).

The considerations advanced by this court in its prior opinion suggest that there is an obligation to look beyond the face of these indictments to determine their validity. As we stated, "[t]he possibility that a selective service indictment will not be supported by the record is not insubstantial." United States v. Lockwood, supra at --. In order to determine if these indictments have any merit each defendant's selective service file must be examined.

A further consideration arises from the unique nature of selective service cases. In criminal prosecutions involving selective service registrants who have refused to submit to induction, judicial review of a classification determination by a draft board must be based only upon material in the registrant's file. See, e.g., Witmer v. United States, 348 U.S. 375, 75 S. Ct. 392, 99 L. Ed. 428 (1955); Cox v. United States, 332 U.S. 442, 453-55, 68 S. Ct. 115, 120-21, 92 L. Ed. 59 (1947), reh. denied, 333 U.S. 830, 68 S. Ct. 449 (1948); United States ex rel. Checkman v. Laird, 469 F. 2d 773 (2d Cir. 1972); United States v. St. Clair, 293 F. Supp. 337 (E.D.N.Y. 1968).

The court recognizes that there is an interest in the confidentiality of these files. This

interest, however, must yield to the public interest in having essential evidence relating to a defense in a criminal case considered by the court. Cf. Mackey v. United States, 351 F. 2d 794 (D.C. Cir. 1965)(police records); United States v. Abbott, 425 F. 2d 910, 913, n. 4 (8th Cir. 1970) (selective service registrant's right to see file); Sheats v. United States, 215 F. 2d 746 (10th Cir. 1954)(same). Cf. United States v. United States Gypsum, 43 U.S.L.W. 2194 (W.D. Pa. Oct. 21, 1974). It is partly for this reason that defense counsel has an absolute right to see the selective service files pertaining to his client.

In United States v. Abbott, 425 F. 2d 910, 913, n. 4 (8th Cir. 1970), the court stated:

> "It is well settled that a registrant is entitled to know the content of his file so as to be aware of any adverse evidence therein. . . . Fundamental due process requires that the defendant be entitled to either know or be able to infer from the file itself the basis for the rejection of a . . . claim."

Moreover, to the extent that the files may provide a basis for dismissing these cases, their production is counseled, if not mandated, by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Recognizing this right to see the files, the policy of the Selective Service System is to ensure that an indicted registrant be provided with a copy of his file in order to adequately prepare his defense. 32 CFR § 1608.3(e) provides in relevant part:

> "Where a registrant has been indicted under the military Selective Service Act and must defend himself in a criminal

> prosecution . . . to test the validity of his induction, it is the policy of the Selective Service System to furnish, to him or to any person he may designate, one copy of his selective service file free of charge."

Indictments in selective service cases in this district are based almost entirely on the file. Thus, where the validity of an indictment is being questioned, the defendant or his appointed counsel is entitled to examine the registrant's file.

The issue of validity of the indictment may be congruent with the general issue, as the government suggests. See United States v. Cesaletti, -- F. Supp. -- (D.N.J. 1974). But since selective service prosecutions consist essentially of judicial review of an administrative record, the court can determine the legal validity of the indictments without trying the issue or providing a defense of double jeopardy.

Once counsel has examined each selective service file, he may present the court with additional information sufficient to alter the weight of the variables in the speedy trial equation. In addition, other factors may be revealed as a basis for the dismissal of these indictments. For example, courts have found that the pre-indictment delay in selective service cases before them violated the special statutory mandate regarding the prosecution of selective service cases. 50 U.S.C. App. § 462(c). See United States v. Daneals, 370 F. Supp. 1289 (W.D.N.Y. 1974); United States v. Golon, 378 F. Supp. 516 (D. Mass. 1974).

One decision, United States v. Dyson, 469 F. 2d 735 (5th Cir. 1972), involved a 22 month delay,

during which the defendant was available, between indictment and trial. The court found that 50 U.S.C. App. § 462(a) which directs that "[p]recedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing" had been violated. The government argues that this statute was not intended to afford a delinquent registrant a defense to an indictment for violating the Selective Service Act. The court in Dyson, however, noted that: "Draft refusers could expect to be brought to book quickly, but likewise they had the right to demand similar expedition of the awesome crimination sanction." Id. at 738.

We make no determination regarding the applicability of these statutes or decision to the twenty-six cases before us. We cite them merely as an example of the kind of considerations which may become significant once individual files are assessed.

V.

CLASS ACTION STATUS

Counsel's general motion to dismiss these indictments constitutes, in effect, a determination to handle these cases in a multi-party proceeding, similar to a class action. Although the equivalent of a class action might lie in a case such as this, see, e.g., United States ex rel. Lois Sero v. Preiser, Slip Op. 74-1944 at 266-70 (2d Cir. Nov. 6, 1974), the court has a degree of discretion in determining whether to review each case individually or to decide them as a group.

Thousands of similar indictments are pending across the country. At least two

other district courts are considering their validity, despite the fact that the defendants are fugitives. United States v. Kibbe, -- F. Supp. -- (D. Conn. 1974); United States v. McKinney, F. Supp. -- (E.D. Calif. 1974). At this time it would be inappropriate to treat these cases as a class for two reasons. First, further study of each individual case may bring to light new considerations, beyond the speedy trial claim, which may affect not only that indictment, but which may also be relevant to the entire group. Second, although some form of class action might be desirable, the stare decisis effect of an appellate court decision granting defense counsel's motion in an individual case would be the equivalent of a class action disposition, whereas a determination by a District Court would not have the same weight. Moreover, when an important constitutional issue is raised which may require Appellate and Supreme Court adjudications, it is particularly appropriate to develop individual records for the benefit of the reviewing court.

CONCLUSION

Defendants' motion is denied with leave to renew. In order to properly determine the validity of the charges brought against these defendants, the selective service files shall be made available to defense counsel. This will permit them to make motions in each case should they believe it appropriate to do so.

The court recognizes that such an examination of so many files places an onerous burden

upon counsel. If defense counsel desires aid, the court will entertain a motion to take appropriate ameliorative action.

So ordered.

Dated: Brooklyn, New York
November 26, 1974

/s/ Jack B. Weinstein
U.S.D.J.

APPENDIX F

Court of Appeals judgment, January 30, 1975

[Caption omitted]

A petition for a writ of mandamus and or prohibition having been filed and oral argument having been heard,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is granted.

A. Daniel Fusaro
Clerk

By Edward J. Guardaro
Senior Deputy Clerk

* * *

BEFORE: HON. IRVING R. KAUFMAN
Chief Judge

HON. WILFRED FEINBERG

HON. WALTER R. MANSFIELD

January 30, 1975